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CHARLES L. RYAN et al., Petitioners, v. DONALD EDWARD BEATY, Respondent.	No. 02-1161 United States Supreme Court COA# 00-99007 United State Court of Appeals For the Ninth Circuit DC# CV-92-20976-PHX-RGS District of Arizona (Phoenix)

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

While incarcerated at Maricopa County Jail, awaiting trial for sexual assault and murder, Mr. Beaty was harassed by fellow inmates and he began to show signs of depression and paranoia. E.R., Vol. III, F, p. 33, ll. 14-19.[1] Mr. Beaty believed people were putting things in his food and were kicking his door. Id. p. 34, ll. 2-6. The psychiatric staff witnessed the other inmates' acts and believed Mr. Beaty's life was in danger. Id. p. 34, ll. 10-11. Eventually, he went on a hunger strike to protest the dangerous environment. At that point, the jail-house psychiatrist, Dr. O'Connor, intervened and transferred Mr. Beaty, in or around August 1984, to the Durango Psychiatric unit. E.R., Vol. III, B, p. 3, ll. 3-9.

Dr. O'Connor ordered the transfer because of (1) depression and the need to rule out paranoid behavior, Id. p. 30, ll. 6-10, and (2) the need to keep Mr. Beaty safe from other inmates, E.R., Vol. III, F, p. 34, ll. 2-11. O'Connor's superior, Dr. Garcia, approved the transfer for medical reasons, including psychiatric reasons. E.R., Vol. III, F, p. 54 ll. 1-3. The psychiatrists did not discuss the transfer with Mr. Beaty. Id., p. 43, ll. 3-11.

Dr. O'Connor already had established a psychiatric patient relationship with Mr. Beaty beginning the day after Mr. Beaty's incarceration. Id. p. 43, ll. 12-17, E.R., Vol. III, B, p. 9, ll. 6-14. Dr. O'Connor sought to intervene to prevent Mr. Beaty from

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[1] The citation refers to the excerpt of record Mr. Beaty submitted to the court of appeals.

being depressed early on. E.R., Vol. III, F. p. 33, 11. 1-19. Dr. O'Connor gained confidential information at that time and prescribed a course of treatment. E.R., Vol. III, B p. 9, 11. 6-14.

Durango, the facility to which Dr. O'Connor transferred Beaty, is both a jail and a fully accredited, licensed hospital. E.R., Vol. III., F, p. 32, 11. 8-13. All inmates at the unit are deemed to be patients by the psychiatric staff. E.R., Vol. III, B, p. 43, 11. 19-21. Part of Mr. Beaty's treatment at the psychiatric ward was to participate in group therapy to ward off his depression and to prepare him for potential incarceration at the Department of Corrections. Id. p. 39, 11. 15-16. Inmates who refuse to participate in group therapy while at Durango are subject to being returned to the main jail. E.R., Vol. III, F, p. 35, 11. 15-25, p. 36, 11. 1-3.

The Durango facility houses both male and female inmates. At the time that Mr. Beaty was housed at Durango, male inmates were making sexual catcalls and vulgar comments to the female inmates. E.R., Vol. III, B, p. 16, 11. 24-25, p. 17, 11. 1-3. Mr. Beaty was identified as displaying such behavior. Id. p. 20, 11. 14-19. At that time, Dr. O'Connor decided to hold group therapy sessions that would bring together five male and five female inmates "to explore the difficulties that they may have had in interrelating with members of the opposite sex in their personal lives." E.R., Vol. III, F, p. 27, 11. 20-22. Dr. O'Connor hoped that by exploring their sexual problems, the male inmates would see the females as human beings and not as sex objects. Id. p. 28, 11. 11-14. He

also hoped to use the sessions for data to write an article. These sessions took place between Thanksgiving and Christmas 1984 and were held every Tuesday and Thursday. E.R., Vol. III, B, p. 27, ll. 12-16. Mr. Beaty was selected to participate in this group, because of his "juvenile" and "horny" behavior toward women. Id. p. 20, ll. 14-19. During the group therapy sessions, Mr. Beaty was expected to discuss and explore his behavior in his relations with women. The discussion was not limited to problems in the prison setting.

Prior to his participation in the group, Mr. Beaty was required to sign a contract entitled, "INTERPERSONAL RELATIONS GROUP CONTRACT." The contract read:

"INTERPERSONAL RELATIONS GROUP CONTRACT"

Please read the following guidelines and sign below.

1. I will attend each group meeting unless I have other "official" commitments e.g. court because I am an important part of this group; I AM this group.

2. I have the ability to observe my own behavior; I can distinguish my actions as appropriate or inappropriate. Should I choose to behave inappropriately, I will be asked to leave the group.

3. I understand that all group communication is confidential and therefore group business cannot be discussed outside of the group. Only in this way can I feel free to express my feelings.

4. I am committed to myself, and therefore to this group to learning about myself, my feelings and my behavior about relationships. I understand that growth will come from examining my thoughts, feelings and behavior in my relationships. Finally I accept the responsibility of being good to myself.

I, Donald E. Beaty have read the guidelines listed above and I agree to follow them as a group member.

I, Lilly Epler understand that my job that my job as therapist is to assist Don with his/her growth in relationships, I am personally committed to this goal with Donald Beaty.

Date: Nov. 15, 1984. E.R., Vol. III, tab A.

All ten participants including Donald Beaty were deemed to be patients and to be undergoing treatment by their participation. Dr. O'Connor testified, "I wasn't treating Mr. Beaty in particular at that time * * * [i]t was a group therapy for all ten of the people." E.R., Vol. III, B, p. 18, ll. 20-21 (emphasis supplied). Dr. O'Connor went on to testify, "[A]ll ten of the participants would have been the focus of the group * * *. There would be individual problems that came up that the group would handle." Id. p. 19, ll. 19-25; Id. p. 31, ll. 3-7 ("Q. So during the sessions, even though they were experimental or research sessions, * * * you were still the doctor and Mr. Beaty was still the patient; is that correct? A. Yes."). When asked the reasons he created the group, Dr. O'Connor responded, "[T]o be of help to the people who participated, although we intended to get research from them, we were also hoping to be therapeutically useful to the participants." Id. p. 16, ll. 8-11.

At the time Mr. Beaty was selected to discuss what were his "feelings and behavior" toward members of the opposite sex, he was in jail awaiting trial for an incident relating to his feelings and behavior toward a member of the opposite sex. At no time, prior to or during this custodial exploration of Mr. Beaty's sexual difficulties did the jail house staff warn Mr. Beaty that he had a right to remain silent or to talk to an attorney. E.R., Vol. III,

F, p. 36, ll. 9-12; E.R., Vol. III, B, p. 28, ll. 14-25. To the contrary, he was promised confidentiality. At no time did Mr. Beaty indicate a desire to waive any constitutional rights. E.R., Vol. III, B, p. 29, ll. 4-9. Mr. Beaty already had undergone one trial and was awaiting a second trial, so the staff knew he had counsel. Indeed, Dr. O'Connor viewed Mr. Beaty as a high profile case.

Dr. O'Connor's agenda for the group was inappropriate sexual problems with the opposite sex. During the course of the group discussion on inappropriate male sexual behavior towards women, group participants began taunting Mr. Beaty about the crime he was accused of committing. While Dr. O'Connor monitored the discussion, participants accused Mr. Beaty of being "cold-blooded." E.R., Vol. III, F, p. 39, ll 3-5. They accused him of being a "terrible person." Id. p. 46, ll. 6-7. They accused him of committing the crime. Mr. Beaty attempted to deny committing the crime. Id. p. 39, ll. 6-7. Dr. O'Connor did not intervene or assist him. All this took place in Dr. O'Connor's presence and under his direction in a state-created forum in which Mr. Beaty was instructed to reveal his sexual feelings and behavior toward women under a promise of confidentiality.

The group was vivacious and the session ran over its allotted time. Id. p. 31, ll. 16-19. At the end of the session, members of the group including Donald Beaty went up to Dr. O'Connor to continue discussing topics addressed in the group session. E.R., Vol. III, B, p. 21, ll. 23-25, p. 22, ll. 1-13. When Mr. Beaty got

his opportunity to address Dr. O'Connor, Mr. Beaty indicated his distress at being accused by group members, E.R., Vol. III, F, p. 29, ll. 11-13, and allegedly stated that he was not the terrible person group members accused him of being and that he did not mean to kill the girl, but that he tried to keep her from screaming, Id. p. 30, ll. 22-25, p. 31, ll. 1-5. Dr. O'Connor testified that the foregoing remark was "an overflow of feelings from that particular group." Id. p. 29, ll. 12-13.

Mr. Beaty's remark was made a few minutes after the session formally adjourned. Id. p. 29, ll. 14-18. At the time Mr. Beaty made his remark, he still was a patient of Dr. O'Connor. E.R., Vol. III, B, p. 31, ll. 18-23. There probably were prison guards and other members of the group present, but there is no evidence anyone was within hearing range. Id. p. 21, ll. 19-22.

Despite the contract signed by both Mr. Beaty and the State promising confidentiality, Dr. O'Connor repeated Mr. Beaty's alleged remark to the prosecutor during the course of Mr. Beaty's second trial. Dr. O'Connor described himself as a "family man" who had "very strong feelings about the nature of the charge here." E.R., Vol. III, B, p. 50, ll. 18-17. At a motion in limine hearing, Dr. O'Connor testified that he still was treating Mr. Beaty at the time the statement was made. Id. p. 31, ll. 18-23. He admitted that his opinion changed about whether there was a privilege from the time of his disclosing the communication to the time of the hearing. Id. p. 35, ll. 2-4.

Dr. O'Connor's attorney, former United States Attorney Mel McDonald, submitted a brief objecting to Dr. O'Connor's having to testify on three grounds: (1) doctor-patient privilege; (2) involuntariness of the confession; and (3) the failure to give Miranda warnings. Mr. Beaty's trial attorney adopted the memorandum and had it filed as Mr. Beaty's own which the court allowed. Id. p. 55, ll. 9-15. The trial court did not rule on the voluntariness or Miranda issues, but ruled that section 13-3620 of the Arizona Revised Statutes required physicians to report cases of child abuse and, therefore, there was no privilege. Dr. O'Connor, thus, was ordered to testify.

The trial court never addressed the constitutional violations presented to it. Indeed, the court clearly showed that its only interest was whether the physician-patient privilege was abrogated pursuant to the statute. For example, the court stated

> I think maybe we're wasting a lot of time, because I think * * * probably the primary controlling issue I think we ought to resolve first is the applicability or inapplicability of [the privilege]. * * * If I rule that * * * there is no privilege, then it doesn't make any difference what the practical background is.

Motion in Limine at 10.

On appeal, the Arizona Supreme Court limited its discussion of the voluntariness issue to one paragraph. The court simply stated, "The defendant's inculpatory statements were not regarding group business nor were they given during the group session. The statements were not induced or coerced by defendant's membership in the group. They were unrelated to the group sessions and were

spontaneously made." State v. Beaty, 158 Ariz. 232, 240, 762 P.2d 519, 527. There was no citation to the accusations leveled against Mr. Beaty by the group members or to Dr. O'Connor's testimony that Beaty's comments were "an overflow of feelings from [the] group," or that Mr. Beaty made the remark as a means of denying what was said by group participants which, by necessity, would mean his remarks were related to the group session and regarded a group subject. There was no citation to Dr. O'Connor's own testimony that Beaty was speaking in response to the group's discussion about his alleged crime. The court also gave no legal analysis explaining its conclusion.

In addressing Mr. Beaty's Miranda argument, the Arizona Supreme Court held, "We believe that where the statements are entirely spontaneous, and are not solicited by questions or acts reasonably likely to elicit a confession, Miranda warnings are not a prerequisite for admissibility." Id. at 241, 762 P.2d at 528. There was no discussion about Dr. O'Connor's contract that required Mr. Beaty to discuss his behavior toward the opposite sex. The Arizona Supreme Court also held there was no patient-physician relationship, because Mr. Beaty made his remark after the session had recessed and because Dr. O'Connor testified that he "wasn't treating Mr. Beaty in particular at that particular time. It was a group activity for all ten of the people." Id. The court apparently was of the opinion that no one was being treated or that because others also were being treated, Mr. Beaty was not being treated. Last, the court ruled that the privilege had been waived

by the presence of third persons. Id. at 241, 762 P.2d at 527. No discussion was made about who those persons were or about the undisputed lack of any evidence that anyone heard the alleged statement. Id.

The evidentiary hearing provided by the state court clearly did not address any of the constitutional issues. At the district court level, Mr. Beaty moved for an evidentiary hearing to address what happened in the psychiatric therapy and to address the scope and purpose of the contract of confidentiality. The State only claimed that the factual claims had been addressed in the trial court hearing. See Respondent's opposition to Petitioner's motion for evidentiary hearing (Feb. 6, 1995). Now that the Ninth Circuit is remanding for an evidentiary hearing, the State no longer argues the trial court addressed the factual issues, but that the Arizona Supreme Court addressed the issues. However, a review of that opinion shows it does not address at all what was the scope of the promise of confidentiality.[2] As the Ninth Circuit correctly stated, the issue is whether Mr. Beaty reasonably believed his statements were covered by the State's promise of confidentiality. Beaty v. Stewart, 303 F.3d 975 (9th Cir. 2002) (citing United States v. Walton, 10 F.3d 1024, 1029 (3rd Cir. 1993); United States v. Cahill, 920 F.2d 421, 427 (7th Cir. 1990); Hawkins v. Lynaugh, 844 F.2d 1132, 1139 (5th Cir. 1988); United States v. Shears, 762

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[2] It also does not address inmate coercion or coercion to join the group.

F.2d 397, 402 (4th Cir. 1985)). The Ninth Circuit correctly remanded for a hearing on the issues.

II. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY REMANDED FOR AN EVIDENTIARY HEARING ON THE ISSUE OF THE MEANING OF THE PROMISE OF CONFIDENTIALITY, THE COERCION IN JOINING GROUP THERAPY, AND INMATE COERCION.

In a unanimous opinion authored by The Honorable Diarmuid F. O'Scannlain, a conservative member of the court, the Ninth Circuit remanded this case for an evidentiary hearing. The State sought en banc review. No judge of the Ninth Circuit voted in favor of en banc review. The State now argues the Supreme Court should issue a writ of certiorari to the Ninth Circuit; yet, the State fails to identify why the Supreme Court should grant discretionary review. The State makes no reference to any aspect of rule 10 that might apply. See S. Ct. R. 10. The State just does not like the Ninth Circuit's ruling.

The State argues that the remand violates the principles of Sumner v. Mata, 449 U.S. 539 (1981) and the provisions of 28 U.S.C. § 2254(d). In Sumner, the Supreme Court noted that the Ninth Circuit found facts contrary to the California Court of Appeals' finding. The Supreme Court's opinion makes clear that the foregoing is completely permissible. Rather, the Supreme Court's concern was that the Ninth Circuit simply had not followed the proper standard. For example, in remanding, the Supreme Court stated,

> [W]e are not to be understood as agreeing or disagreeing with the majority of the court of

> appeals on the merits of the issue of impermissibly suggestive identification procedures. Both the California courts and the federal courts relied on the basic Simmons case for their legal analysis. Applying the same test, the majority of the Court of Appeals for the Ninth Circuit reached a different determination than all the other courts which considered the issue. Assuredly this is not the first nor the last time that such a result will occur. We do think, however, that Congress was intent on some sort of written explanation of the section 2254(d) factors when such a result does occur.

Id. at 552.

In the present case, however, the Ninth Circuit has not found different facts at all. It merely has remanded for a hearing. The issue therefore is whether the Ninth Circuit erred by ordering a hearing on the critical question of the scope of the State's confidentiality promise.

A petitioner is entitled to an evidentiary hearing if he asserts a colorable claim and a state court does not offer a "full and fair hearing" on the claim. Townsend v. Sain, 372 U.S. 293, 313 (1963); Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001), cert. denied 123 S.Ct. 468 (2002). The State, throughout these habeas proceedings, has conceded that this is the test and that Mr. Beaty is entitled to an evidentiary hearing, if he can show the foregoing. See e.g. respondents' opposition to petitioner's motion for evidentiary hearing (Feb. 6, 1995). At no time has the State argued that Mr. Beaty waived his right for an evidentiary hearing under federal law until now for the first time in its petition for a writ of certiorari. In light of the

foregoing, the State has waived the argument. See Smith v. Zant, 887 F.2d 1407, 1438 (11th Cir. 1989).

Addressing the first prong of the foregoing test, Mr. Beaty clearly has asserted a colorable claim. A promise of confidentiality prohibits a State from using the solicited statements against a criminal defendant. Pens v. Bail, 902 F.2d 1464 (9th Cir. 1990) (psychologist promised not to use admissions of sexual crimes against defendant, held: subsequent statements were involuntary and inadmissible); United States v. Walton, 10 F.3d 1024, 1031 (3rd Cir. 1993) (defendant's statement was involuntary because federal officer made a promise of confidentiality); United States v. Harrington, 923 F.2d 1371, 1377 (9th Cir. 1991) (defendant's statement was involuntary because it was made during a court ordered mental examination and a state statute provided that statements would remain confidential); United States v. Robinson, 439 F.2d 553, 560 (D.C. Cir. 1970) (confession obtained by prison psychologist was involuntary because defendant reasonably understood his communications would remain confidential); United States v. Conley, 859 F.Supp. 330 (W.D. Penn. 1994) (defendant's statements were involuntary because he was promised he could speak "off the record"); United States v. D.F., 63 F.3d 671 (7th Cir. 1995) (defendant's statements involuntary because defendant understood her statements to psychologist and those associated with her group therapy were confidential). The State does not contest that Mr. Beaty has a colorable claim.

Addressing the second prong, Mr. Beaty did not have a full and fair hearing. All the state and federal courts that have been involved in this case agree that Mr. Beaty presented his constitutional issues to the trial court. There also is no factual dispute the trial court ignored the constitutional issues altogether in deciding that Dr. O'Connor would testify against Mr. Beaty.

A cursory review of the State's briefs throughout the state and federal courts, until its petition for writ of certiorari, shows that the State never has contested any of the foregoing. Indeed, the State readily agreed before the Ninth Circuit that the test of whether statements are involuntary in light of a promise of confidentiality, requires a reviewing court "[to] examine the promise from the defendant's view point to determine whether the defendant reasonably perceived the promise as he asserts." Respondent's brief, at 43. Yet, that issue never was addressed in the state court. Instead, the trial judge repeatedly made clear that his interest was in whether a state statute abrogated the physician-patient privilege.

Notably, the state court hearing took place in response to Dr. O'Connor's refusal to testify.[3] The motion, asserting

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[3] Dr. O'Connor already had gone to the State prosecutor and had no qualms informing the prosecutor of any and all of his communications with Mr. Beaty and the other group members. Afterward, his supervisor reminded Dr. O'Connor that he was a physician with certain ethical duties that required his not talking about patient confidences. All of Dr. O'Connor's statements adverse to Mr. Beaty (such as that Mr. Beaty's statement shocked him and that it came out of the blue and that there was no privilege) were made by Dr. O'Connor at his meeting with the

constitutional issues, including voluntariness, was brought to the trial court's attention at the outset of the hearing because the State tried to strike it. Motion in Limine at 3. As the hearing progressed, the trial court indicated to the parties the court deemed the true issue to be the evidentiary privilege, as pointed out by the Ninth Circuit. See Motion in Limine at 10. In light of the foregoing, Mr. Beaty did not receive a "full" hearing, despite having presented the constitutional issue to the court.

The State argues for the first time in its petition for writ of certiorari that Mr. Beaty did not raise the issue of voluntariness before the trial court. In state court, however, the State argued the very opposite position by asserting the issue of confidentiality was presented to the trial court. See Appellant's Opening Brief, at 13 n. 10. The Arizona Supreme Court agreed. The State cannot argue otherwise now. However, the confusion between Mr. Beaty's state court appellate counsel and the Attorney General on the issue, at the time of direct appeal, only further demonstrates that while the issue was presented, the trial court did not provide a full hearing on the matter.

The State next argues, for the first time, that the issue of whether there was a full and fair hearing never was raised to the state courts and, thus, is waived. However, in its Appellee's Answering Brief to the Arizona Supreme Court, the State first

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prosecutor when Dr. O'Connor wanted to justify why he was revealing such confidences. Of course, the real reason he was with the prosecutor is revealed in his statements that he was a family man and angry about the crime.

admitted the issue of voluntariness was brought to the trial court's attention at the evidentiary hearing, but the trial court did not address the issue. The State then unsuccessfully argued that the Arizona Supreme Court should not address the voluntariness issue because once the trial court failed to address this issue at the evidentiary hearing, defendant should have made a second motion to the trial court for a "voluntariness hearing," despite having raised the issue at the evidentiary hearing that the trial court held.[4] See Appellee's Answering Brief 15-16. The State went on to argue, "[W]ithout the evidence and factual decision in the record [on voluntariness], the reviewing court is limited to sheer speculation on appeal." Id. In summary, the State argued the issue was raised, but because the trial judge did not rule on it and Mr. Beaty did not file a second motion, the record was undeveloped which would cause an appellate court to engage in "shear speculation" in deciding whether the confession was voluntary.

The foregoing argument is precisely the Ninth Circuit's point; it is sheer speculation about what Mr. Beaty's understanding was on the promise of confidentiality because the state trial judge would not go into it. Accordingly, the issue of whether the trial court conducted a "full and fair hearing" on voluntariness was indeed presented to the State Supreme Court by the State itself when it argued the hearing was inadequate. The State is estopped from

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[4]The State failed to carry this argument forward to the federal courts until now in its petition for a writ of certiorari.

arguing otherwise now. At the same time, the state supreme court rejected the State's concluding argument that Mr. Beaty was required to file a second motion with the trial court for a "voluntariness hearing" to be able to obtain appellate review, as the state supreme court did review the issue.

In light of the foregoing, the issue of whether there was a full hearing on the issue of voluntariness was presented to the state courts. The State itself raised the issue and made the argument in unsuccessfully trying to argue the state supreme court did not have jurisdiction over the issue. Accordingly, there has been no waiver of the issue by Mr. Beaty. To the contrary, since the State only now in its petition for a writ of certiorari makes the foregoing argument that the issue of the adequacy of the hearing was not raised, it is the State that has waived its exhaustion argument of the hearing's adequacy under federal law. Smith v. Zant, 887 F.2d 1407, 1438 (11th Cir. 1989).

The State was wrong that a separate hearing had to be requested on voluntariness because the issue of voluntariness was presented to the state court. The State is correct, however, that the state trial court chose to restrict the hearing. In light of the foregoing, the Ninth Circuit correctly ordered a remand for an evidentiary hearing.

The Ninth Circuit correctly chose not to engage in the district court's assuming facts that are not in existence. A review of the district court's analysis, undertaken without the benefit of a hearing, despite Mr. Beaty's request, shows how the

district court assumed facts, beyond the state court's findings, to resolve the legal issue. The district court found that the contract of confidentiality was qualified and contingent; that Mr. Beaty knew the promise of confidentiality was qualified and contingent on discussing group business during the group "session"; and that since Mr. Beaty made his statement after the group "session" ended, he knowingly and voluntarily made his incriminating statement beyond the contingency. None of the foregoing findings has a factual basis to support it. There never has been a hearing or even oral argument on the scope of the contract or on any other aspect of the contract. Neither Mr. Beaty's, nor Dr. O'Connor's intentions or understandings about the contract are known to allow the court to interpret the contract's meaning. Since the district court's analysis was meant to give effect to the intention of the parties, the court should have held a hearing before it concluded what the parties' understandings were.

The only developed facts are (1) participants, including Dr. O'Connor, were not allowed to discuss group business "outside of group"; (2) Dr. O'Connor and Mr. Beaty were members of the group; (3) the session ran late; (4) even after the session formally "adjourned," group members continued to discuss group business with Dr. O'Connor; (5) as part of the ongoing discussion, Mr. Beaty made the statement to Dr. O'Connor, the leader of the group, the person who completely controlled the group, in the same room with the same group present and (6) Mr. Beaty's comments were an overflow of the

group discussion. There is nothing in the foregoing facts that suggests behavior by Mr. Beaty inconsistent with the promise of confidentiality.

The language of the contract runs counter to the district court's conclusion and favors Mr. Beaty's understanding. The contract reads, "group business cannot be discussed outside of group [sic]." Dr. O'Connor is not outside of the group. Mr. Beaty spoke to a group member, within the group meeting room, while the group continued to discuss group business. Thus, his words were protected by the confidentiality clause. The contract language does not read, "There is no confidentiality once the session is formally adjourned even though group members continue to discuss group business in the group meeting room." The word "session" never is mentioned in the contract and certainly is not listed as being the time when communications could or could not take place confidentially.

With no facts on the meaning of the contract's requirement that group business not be discussed outside of the group, the district court was required to apply the rule of contra proferentum and construe the contract in favor of Mr. Beaty, since the State authored the contract, in which case the court should have found that statements remain confidential when group members discuss group business with group members, at least while they still are in the group meeting room and the statement is made to the one who exercises complete control over the group and its subjects for discussion. A. Farnsworth, Contracts § 7.11, at 499 (1982) ("An

especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred."). The district court's interpretation of the meaning of the contract also fails to view the promise of confidentiality from Mr. Beaty's viewpoint, as requested by law. Miller v. Fenton, 796 F.2d 598, 608 (3rd Cir. 1986).[5]

The district court neither relied on case law in reaching its conclusion that the contractual promise had expired, nor distinguished the cases cited by Mr. Beaty that support the proposition that the contract of confidentiality clearly still applied. In Westover v. United States, 384 U.S. 436 (1966), a companion case to Miranda, the Kansas City Police interrogated a defendant at the local police station about a specific crime without giving any warnings. The FBI then interrogated the defendant at the same location about a different crime. The FBI first gave Miranda-like warnings. Nevertheless, the Supreme Court held that because the interrogation took place at the same location within an hour after the local police interrogated the defendant

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[5]The district court's decision also runs counter to Jaffee v. Redmond, 518 U.S. 1 (1996) in which the Supreme Court established a therapist-patient privilege. Although the Redmond holding concerns the creation of a federal common law rule of evidence, the Court's emphasis on the need to foster and protect confidential communications is applicable to the district court's holding that Mr. Beaty's communication to his psychiatrist is not protected, because it came within minutes of the accusations of Mr. Beaty's committing alleged crime. Redmond requires complete confidentiality even if the "session" is formally adjourned.

without giving him his rights, the alleged confession to the FBI was inadmissible. Id. at 495-96.

In Leyra v. Denno, 347 U.S. 556 (1954), a psychiatrist obtained a confession by stating that he wanted to help the defendant. The defendant then asked to speak to the police and blurted out having committed the crime. The defendant later again confessed committing the crime to his business partner who had asked no questions at all. Id. at 587 (Minton, J., dissenting). Hours after that, the defendant even gave a formal confession to a stenographer for the prosecutor.

The state courts struck down the confession to the psychiatrist, but upheld the later confessions. After discussing the considerable persuasive effect of psychiatry in breaking down a defendant's will, the Supreme Court held that the subsequent confessions were similarly tainted. The court held that "the relation of the confessions made to the psychiatrist, the police captain and the state prosecutors is 'so close that one must say the facts of one controlled the character of the other * * *.'", Id. at 561. The court further noted, "All were simply parts of one continuous process." The statements were made in the same place within a period of about five hours. The court concluded, "We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our constitution." Id.

Leyra is on all fours with the present case. As in Leyra, the alleged confession also took place in the same location where group

members accused Mr. Beaty of committing the crime as part of Dr. O'Connor's inquiring about past sexual behavior. Mr. Beaty's confession to the psychiatrist running the group, likewise, was "so close that one must say the facts of one controlled the character of the other." Id. Therefore, at least a hearing is required.[6]

In United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970) a murder suspect in a mental hospital called his psychologist and confessed to the crime. The psychologist then had the suspect confess to others, including the police. The court of appeals held the confession was inadmissible as the defendant was under the influence of his psychologist. The district court held that Robinson was clearly distinguishable because Mr. Beaty was not a mental patient. This factual finding is not only unsupported in the record, but it is contrary to the undisputed facts that Mr. Beaty was a psychiatric patient. Indeed, the whole group therapy pertained to treating the problems that Mr. Beaty and others had dealing with the opposite sex and it was intended to help cure him so that he would see women as human beings and not objects for sex.

The district court also held that Mr. Beaty did not have a long term relationship with Dr. O'Connor, unlike the defendant in Robinson had with his psychologist. This too ignored the undisputed facts that Dr. O'Connor was the psychiatrist who

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[6] The present facts are similar to Mr. Beaty's being in Dr. O'Connor's private office for one-on-one therapy and, then, after the session formally ends and Mr. Beaty is heading for the door, he makes an inculpatory statement. Logically and legally, the statement is as inadmissible at that point as it would have been if made before Mr. Beaty got up from the couch.

intervened to protect Mr. Beaty from the physical harassment of other inmates and intervened to end Mr. Beaty's hunger strike. It also ignores that the group therapy took place during the holidays about six to seven months after Mr. Beaty was first incarcerated. Dr. O'Connor was monitoring Mr. Beaty from the outset of his carceration for depression and, as an internist, for Mr. Beaty's foot injury. In addition, patients were aware the group therapy sessions were to run twice a week for an indefinite time thereby further solidifying the psychiatric relationship on this very subject matter.

The same rationale applied in Robinson was adopted by the Seventh Circuit in United States v. D.F., 63 F.3d 671 (7th Cir. 1995). In D.F., a twelve year old with a history of assault and battery was admitted to a mental health facility against her will. D.F. was placed in group therapy for treatment of behavioral problems relating to abusing others. Patients were encouraged to talk openly about their behavioral problems. This is similar to Mr. Beaty's being placed in a group therapy program to address behavioral problems relating to viewing women as sex objects and being encouraged to talk openly about his deviant behavior.

While D.F. was at the center, she was a suspect in the earlier deaths of her cousins. While Mr. Beaty was at the mental ward, he was not just a suspect, but the actual incarcerated defendant concerning a criminal act. The center's staff were aware of the suspicions about D.F. through the agency investigating the deaths. Dr. O'Connor was aware of Mr. Beaty's charges as he testified he

knew Beaty was a high profile case. The center staff therefore frequently reminded D.F. that they would report any of her statements or admissions. Dr. O'Connor did the opposite; he assured confidentiality. At the same time, as part of her treatment, the staff would encourage D.F. to discuss and reveal her secrets and to speak openly with staff about the problems she had had in her life concerning physical harm she had caused other children. Dr. O'Connor and his staff similarly encouraged Mr. Beaty to discuss openly the problems he had had in his life concerning his viewing women as sex objects for sexual satisfaction.

Despite the warning that what she might say would be reported to authorities, D.F. admitted several instances of abusing children. Several hours later she spontaneously told a staff person about the murders and of her relief from the disclosure. Id. at 675. She later confessed another ten times without any prompting. Id. At that point, as in the present case, a staff member reported the confession.

As in the present case, the forum that overcame D.F.'s will was group therapy. However, instead of confessing within a few minutes to up to 15 minutes of actually being accused of the crime, as with Mr. Beaty, D.F. revealed her wrongful acts several hours later stating that the secret had been eating her up and then ten more times after that. The district court noted that the staff knew of D.F.'s suspected involvement in the deaths of her cousins and encouraged her to talk about her past crimes. This is the same

as Dr. O'Connor's knowing that Mr. Beaty was awaiting trial for murder and sexual assault of a female and yet he encouraged Mr. Beaty to talk about his problematic behavior toward woman. The district court concluded that D. F.'s statements were "secured through psychological coercion and were not the 'product of a rational intellect and free will.'" United States v. D.F., 857 F. Supp. 1311, 1317 (E.D. Wis. 1994). Mr. Beaty's will also was overborne by accusations in the setting of the group therapy.

The government in D.F. argued that D.F. interjected her confession in group therapy, "taking her social worker completely by surprise." D.F., 63 F.3d at 678. This is similar to the State's arguing that Mr. Beaty's statement sub judice came "from out of the blue" and "shocked" Dr. O'Connor and appeared to be a spontaneous remark. The government also argued the district court ignored the ten subsequent spontaneous confessions. Id. at 677-78.

The Seventh Circuit rejected the foregoing arguments. In reaching its conclusion, the court noted, "Psychiatric care often involves, * * * , an effort to have the patient discuss freely with the caregiver his apprehensions and fears." Id. at 683. The court continued, "[I]t is also salutary, at least in some situations, for the patient to take responsibility for his actions and to experience the consequences that flow from taking such responsibility." Id. The court concluded, "[If] the caregiver goes beyond these accepted medical roles and affirmatively takes on the role of delivering someone who is in his care and custody to

the prosecutor, the district court is entitled to determine that the caregiver has changed his role substantially." Id.

The present case is even more compelling than D.F. as Mr. Beaty was not in a nonpenalogical facility for some collateral concern like D.F., thereby raising the question of State action. Rather, Mr. Beaty was in the psychiatric ward of the jail house awaiting trial for the very act that caused him to be incarcerated and his adversary was the State's jail-house psychiatrist. As the Supreme Court has held,

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist, if his statements can be used against him at a capital crime proceeding.

Estelle, 451 U.S. at 467. Accordingly, the Ninth Circuit was correct to remand for a hearing.

The Ninth Circuit already has addressed the very issue sub judice and has held a defendant, who confesses based on promised confidentiality, is entitled to suppress such statements. Pens v. Bail, 902 F.2d 1464, 1465 (9th Cir. 1990). In Pens, a psychiatrist promised a defendant that anything the defendant said would be confidential. The psychiatrist then questioned the defendant about his past sexual acts, stating, as in the present case, that defendant's cooperation was "necessary for successful treatment." Id. The defendant's statements were used against him anyway at a sentencing hearing. The Ninth Circuit held that use of the statements violated the fifth amendment. Id. Pens stands for the proposition that when a psychiatrist promises confidentiality so

that an inmate will discuss his sexual problems freely, anything said by the inmate is inadmissible. The Ninth Circuit stated, "In reaching this conclusion we do not rely on any new rule not yet announced at the time the case was pending in the state courts, but rather on a straightforward application of * * * Estelle, and Jones." Id.; see also Jones v.Cardwell, 686 F.2d 754 (9th Cir. 1982) (probation officer must provide Miranda warnings before questioning criminal defendant about crime).

Pens was followed in United States v. Harrington, 923 F.2d 1371 (9th Cir. 1991). In Harrington, the district court relied upon a prior psychiatric examination in which the defendant made incriminating remarks. A state statute specifically assured such defendants that their statements would not be used in any future criminal proceedings. The Ninth Circuit held that, based on the statute's promise of confidentiality, use of the statements violated the Constitution. Id. at 1377.

Likewise, in United States v. Walton, 10 F.3d 1024 (3rd Cir. 1993) a defendant under suspicion of committing a crime called one of the investigating police officers to discuss the matter. The police officer and the defendant were childhood friends who shared a relationship of trust. The defendant confessed to the crime after the police officer assured the defendant he could talk "off the cuff." Id. at 1027. The State used the defendant's statements against him anyway. The defendant argued the officer's promise not to use the conversation induced the defendant to confess.

The Third Circuit began by stating the fundamental premise that it had to examine the promise of confidentiality from the defendant's view point. Id. at 1029. The court then rejected the government's argument that "off the cuff" meant something other than its plain meaning. The court held there was a promise of confidentiality. Id.; see United States v. Conley, 859 F. Supp. 830 (W.D. Penn. 1994) (statements that defendant "could speak 'off-the-record,' (the two having reached the proverbial subjective 'meeting-of-the-minds' that this meant [defendant's] statements would not be used against him) - maintained their 'uniquely influential nature,' and were the cause of [defendant's] statements * * * .").[7]

The district court distinguished Pens, Walton, and Conley by asserting that there was no qualification or contingency about the promise in those cases. However, there was no contingency in the present case either. Indeed, when the contract read that group business could not be discussed "outside of group," the only reasonable interpretation is that nothing could be discussed with nongroup members. Group business never was discussed with nongroup members, until Dr. O'Connor went to the prosecutor.

The district court also held, because Dr. O'Connor was treating nine others as part of a group that Mr. Beaty's belief that what he might say to Dr. O'Connor, one on one, would be confidential, was unreasonable. The Court's statement presumes

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[7]In the present case, the district court erroneously determined the subjective meeting-of-the-minds on the contract language's meaning without any evidence.

that a psychiatrist's patient, for whom the psychiatrist prescribed group therapy, is not a patient of the psychiatrist, except while in group therapy, as a matter of law. This legal conclusion is contrary to Dr. O'Connor's testimony, irreconcilable with the spirit of Redmond, and legally incorrect. Where a patient is examined believing the examiner is a psychiatrist, the patient has a right to rely on the confidence imposed on the person. See Arizona & N.M. Ry. Co. v. Clark, 207 F. 817 (9th Cir. 1913); State v. Steelman, 120 Ariz. 1213, 585 P.2d 1213 (1978). Moreover, the district court's conclusion means by implication Mr. Beaty could speak with impunity to his psychiatrist in front of others, but he would lose his protections if he spoke to his psychiatrist when others were not listening. This leads to an ironic result, because the district court also held there was no custodial interrogation because Mr. Beaty made his statement allegedly in the presence of others. Thus, others from the group had to have been present for the court to deem the alleged confession to be involuntary, while simultaneously the presence of others meant Miranda was inapplicable.

The district court also held that even if a promise had been made, it did not prompt Mr. Beaty to confess. However, the court never held a hearing to determine the likelihood of Mr. Beaty's confessing in response to a promise of confidentiality. In Walton, the court also addressed the issue of whether the defendant confessed because his childhood friend (now police officer) promised defendant's statements would be "off the cuff." The court

noted that such an inquiry takes into account more than just the promise. The court then insightfully stated, "But this does not diminish the significance of the promise itself; given the uniquely influential nature of a promise from a law enforcement official not to disclose a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession in light of the totality of the circumstances." Walton, 10 F.3d at 1030. The court concluded that excessive friendliness on the part of an interrogator can be deceptive. "In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily make only to a friend, not to the police." Id. The court concluded defendant's will had been overborne by the promise from the police.

Walton's rationale is particularly applicable in the present case, because Mr. Beaty had an established relationship, not with a friend or police officer, but with a psychiatrist, who promised Mr. Beaty that only by Mr. Beaty's freely discussing his problems and behavior could the psychiatrist help Mr. Beaty. This is the same psychiatrist who intervened to protect Mr. Beaty from the violent acts of other inmates and who stopped Mr. Beaty's suicidal hunger strike. Dr. O'Connor's being a psychiatrist is more profound than being a friend or even a family member. A psychiatrist is a more dangerous foe, than is a friendly police officer or than even a family member. Lora v. Board of Education,

74 F.R.D. 565, 571 (E.D.N.Y. 1977) ("Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family."). In light of the foregoing, the Ninth Circuit correctly remanded to the district court to hold a hearing on the issue.

III. CONCLUSION

For the foregoing reasons, respondent Donald Beaty respectfully submits that there is no compelling basis under rule 10 or otherwise for the court to grant discretionary review and issue a writ of certiorari. The Supreme Court should deny the petition.

RESPECTFULLY SUBMITTED THIS 11th day of April, 2003.

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IV. CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33, I certify that the brief is

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April 11th 2003
Date

John E. Charland

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County of Maricopa)

John E. Charland, being first duly affirmed, upon his affirmation, deposes and says;

Two copies of **Respondent's Brief in Opposition to Petition for Writ of Certiorari** have this 11th day of April, 2003, been mailed to Attorney General Terry Goddard, 1275 West Washington, Phoenix, Arizona 85007, and a copy has been mailed to Donald Beaty.

John E Charland
John E. Charland

SUBSCRIBED AND SWORN to before me this 11th day of April, 2003, by John E. Charland.

Tia Karin Tang
Notary Public

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Maricopa County
Tia Karin Tang
Expires September 24 2004

Ryan v. Beaty
SUPREME COURT NO. 02-1161

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) ss.
County of Maricopa)

John E. Charland, being first duly sworn upon oath, deposes and says:

that he has read the foregoing Respondent's motion to proceed in forma pauperis and the allegations contained therein and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, except those matters therein stated on information and belief, and as to those matters he believes them to be true.

John E. Charland

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Notary Public

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SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 02-1161

Stewart, Dir., AZ DOC (Petitioner) v. Beaty, Donald E. (Respondent)

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